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No. 79-1631

In the Supreme Court of the United States

OCTOBER TERM, 1979

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

vs.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

On Appeal From The Supreme Court Of Wisconsin

MOTION TO DISMISS OR AFFIRM OF DEMOCRATIC PARTY OF WISCONSIN

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INDEX

PAGE

Statement of the Case 2

Argument 6

I. The Appellants Do Not Have An Appeal As Of Right To This Court 6

II. The Decision Of The Wisconsin Supreme Court Is In Accord With The Decisions Of This Court 7

A. A Political Party Does Not Have the Power to Override an Act of a State Legislature or an Act of Congress in the Name of Protecting its Own Perceived Right to Association and Speech. The First Amendment Rights of a Political Party, Although Great, Are Not Absolute 7

B. The Wisconsin Open Primary Law Does Not Abridge Any of the Associational Freedoms of the National Party 8

Conclusion 13

AUTHORITIES CITED

Cases

American Party of Texas v. White, 415 U.S. 767 (1974) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 8

Cousins v. Wigoda, 419 U.S. 477 (1975) 8

Garrity v. New Jersey, 385 U.S. 493 (1967) 6

Hanson v. Denckla, 357 U.S. 235 (1958) 6

PAGE

Jet Brothers Distilling Co. v. Carrolton, 252 U.S. 1 (1920) 7

Kulko v. California Superior Court, 436 U.S. 84 (1978) 6

Marchioro v. Chaney, ... U.S. ....., 99 S.Ct. 2243 (1979) 8

Marchioro v. Chaney, 90 Wash.2d 298, 582 P.2d 487 (1978), affirmed ..... U.S. ....., 99 S.Ct. 2243 (1979) 8

Mergenthaler Linotype Company v. Davis, 251 U.S. 256 (1920) 6

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, ... U.S. ....., 48 U.S.L.W. 4306 (1980) 12-13

Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960) 6-7

Wilson v. Cook, 327 U.S. 474 (1946) 7

Other Authorities

28 U.S.C. § 1257(2) 6

28 U.S.C. § 1257(3) 6

28 U.S.C. § 2103 13

First Amendment to United States Constitution 6, 7, 8

Fourteenth Amendment to United States Constitution 6

Openness, Participation and Party Building: Reforms for a Stronger Democratic Party, Exhibit 4 at p. 68 9

Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis. L. Rev. 1269 9

Wis. Stats., Section 8.12(c)(5) 12

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MOTION TO DISMISS OR AFFIRM

The appellee, the Democratic Party of Wisconsin (State Party), by its attorneys, Friebert & Finerty by Robert H. Friebert, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Wisconsin on the ground that the question on which the decision depends is so unsubstantial as not to need further argument and further upon the ground that the decision of the Wisconsin Supreme Court is in accord with the decisions of this Court. This motion is brought pursuant to Rule 16 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

In 1903, Wisconsin passed its open primary law to correct one of the most serious political problems facing the country at the turn of the century. It was perceived at that time that partisan political offices were controlled by large commercial interest groups, such as railroads, and that this economic control of the political process was threatening the viability of American democracy. Statehouses were completely dominated by these commercial interest groups. At that time, United States Senators were elected by the legislative branch of state government. There was no easy entry into the political system. American democracy was as closed and as dominated by single issue interest groups as at any time in the history of the United States.

To solve this problem, Wisconsin opened up its entire political system by enacting its innovative open primary law.[1] Caucuses dominated by influential economic interest groups would no longer dictate the tone of state government.

In its present form, the Wisconsin presidential preference open primary establishes the only chance for all of the citizens of the State of Wisconsin to vote for the person they want to be President of the United States. In the general election, the choice is restricted to the nominees of the parties.

The Wisconsin open primary does not result in the election of delegates to the Democratic National Convention. The Wisconsin presidential preference primary results are utilized for the limited purpose of apportioning delegates to the various Democratic candidates for President.

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[1] The open primary law was extended to presidential campaigns in 1905.

The actual selection of delegates commences at Congressional district caucuses organized by the State Party after the primary. The only participants in the actual selection of delegates to the national convention are persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect. The participants in the caucuses are then separated into groups composed of persons who support and publicly pledge that support for the various candidates. It is in these resulting candidate caucuses composed of persons who have publicly declared their support of the Democratic Party and its general principles and who have further declared their support for the particular candidates involved, that the actual delegates to the national convention are selected.[2] The only impact upon the delegate selection process from the Wisconsin open primary is the apportionment of delegates to the various contenders for the Democratic nomination for President.

The National Party has a rule which limits participation in its delegate selection process to persons who openly and publicly state their adherence to the principles of the Democratic Party. The National Party rules allow a closed primary system in which persons wishing to vote in the Democratic primary must publicly register their party preference as a prerequisite to voting. Therefore, the only significant difference between the Wisconsin open

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[2] The delegates and alternates chosen at these congressional district caucuses then choose at-large delegates and other delegates to the convention. The delegation chosen is in complete compliance with the party rules and objectives with respect to sex, race, age, religion, economic status and ethnic origin of delegates and alternates.

primary law, which the National Party challenges, and other means of apportioning delegates to the Democratic contenders for President which the National Party finds acceptable, is that the Wisconsin open primary law does not require persons who vote in the Democratic primary to state their party preference publicly as a prerequisite to voting.[3]

The National Party threatened to disqualify any delegation sent to its national convention from Wisconsin which is apportioned pursuant to the Wisconsin open primary law. As a result, the Attorney General of Wisconsin instituted this action to seek declaratory and injunctive relief to prevent the National and State Parties from carrying out that threat. The State Party cross claimed against the National Party asserting its position that its delegation chosen pursuant to Wisconsin law should be seated at the National Convention.

The National Party argued in the Wisconsin Supreme Court that its constitutional rights pursuant to the First and Fourteenth Amendments to the United States Constitution would be violated because this law conflicts with their rules. The Wisconsin Supreme Court unanimously held that no associational or speech rights of the National Party would be violated and entered a judgment so declaring the rights of the parties.

In the name of "opening" the Democratic Party, the National Party brings this appeal to the United States

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[3] Other means of apportioning delegates which are acceptable to the National Party include a caucus system in which the persons who register with the caucuses determine the apportionment among the various candidates, and election of delegates at State Party conventions.

Supreme Court. Yet the ruling it seeks here is one which would emasculate what is perhaps the most historically significant law enacted by a state legislature in the twentieth century to open up the political process to all of the people. The Democratic Party of Wisconsin believes that this issue is not appealable as a matter of right and, in any event, that the decision of the Wisconsin Supreme Court is so clearly correct that it should be summarily affirmed.

ARGUMENT

I.
THE APPELLANTS DO NOT HAVE AN APPEAL AS OF RIGHT TO THIS COURT.

A litigant in state courts has an appeal as of right to this Court if a state court rules in favor of the validity of a state statute which is challenged on grounds "of its being repugnant to the Constitution . . . of the United States. . . ." 28 U.S.C. § 1257(2). Certiorari is appropriate where a party claims any "title, right, privilege, or immunity . . . under the Constitution. . . ." 28 U.S.C. § 1257(3).

It is not contended by the National Party that the Wisconsin law is unconstitutional on its face. Furthermore, the National Party does not appear to argue that the Wisconsin law is unconstitutional as applied. See Jurisdictional Statement, pp. 2-3. The principal claim of the National Party is that its First and Fourteenth Amendment rights are in jeopardy of being violated because it claims that its rule outlawing open primaries can supersede the Wisconsin law. The focus of this inquiry, therefore, is not upon the validity of the Wisconsin statute.

The issue is the scope and extent of the First and Fourteenth Amendment rights of the National Party and its rules *vis a vis* the Wisconsin open primary law. Consequently, the case is similar to *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958) and is not appealable as of right. Cf. *Kulko* v. *California Superior Court,* 436 U.S. 84, 90 f/n 4 (1978); *Mergenthaler Linotype Company* v. *Davis,* 251 U.S. 256, 259 (1920); *Garrity* v. *New Jersey,* 385 U.S. 493, 496 (1967); *Rohr Aircraft Corp.* v. *County of San Diego,*

362 U.S. 628, 630 (1960); *Jet Brothers Distilling Co.* v. *Carrolton,* 252 U.S. 1, 6 (1920); *Wilson* v. *Cook,* 327 U.S. 474, 482 (1946). The motion to dismiss the appeal should be granted.

II.

THE DECISION OF THE WISCONSIN SUPREME COURT IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

A. A Political Party Does Not Have the Power to Override an Act of a State Legislature or an Act of Congress in the Name of Protecting its Own Perceived Right to Association and Speech. The First Amendment Rights of a Political Party, Although Great, Are Not Absolute.

The basic position of the National Party, however disguised, is that its rules and procedures are superior to the acts of Congress and the laws of all the states. On the federal level, the First Amendment claims of the National Party are so absolute as to necessarily encompass the power to veto Congressional regulation of the presidential nominating process, should Congress decide to legislate in this area. As far as Wisconsin is concerned, the National Party claims the power to effectively override the Wisconsin open primary law with respect to state and federal partisan offices. Indeed, the National and State Parties do not have to accept any primary system, according to the National Party.[4] Since it is the political

[4] The National Party sought to impose a closed caucus system in Wisconsin in 1980 in lieu of the Wisconsin open primary. The results would have been close to the Michigan closed caucus system which displaced its statutory open primary system. Only 15,000 people in the State of Michigan determined the wishes of all Democratic adherents for the entire state. See *New York Times,* Sunday, April 27, 1980, p. 1, column 2.

party that determines the procedure for selecting its candidates, any method which it chooses should be able to obliterate any state law or act of Congress to the contrary, according to the National Party.

The Supreme Court of the State of Wisconsin disagreed. It held that no decision of this Court has ever made such a broad and sweeping interpretation of the First Amendment. It noted that the decisions of this Court always clearly recognized that the states had an interest in assuring fairness in all aspects of the electoral process and that the states and Congress can constitutionally enact laws which reasonably exercise that power as long as there is no substantial burden on the associational rights of political parties. See *Marchioro* v. *Chaney,* ..... U.S. ....., 99 S. Ct. 2243 (1979); *Buckley* v. *Valeo,* 424 U.S. 1, 24-25 (1976), *Cousins* v. *Wigoda,* 419 U.S. 477 (1975); See Opinion of Wisconsin Supreme Court at Ap. app. A at 36a-42a.

B. The Wisconsin Open Primary Law Does Not Abridge Any of the Associational Freedoms of the National Party.

The Wisconsin Supreme Court recognized that the appellants had the burden of proving a substantial burden upon their associational rights. *Marchioro* v. *Chaney,* 90 Wash.2d 298, 582 P.2d 487, 493 (1978), affirmed ..... U.S. ....., 99 S. Ct. 2243 (1979) citing *American Party of Texas* v. *White,* 415 U.S. 767, 790 (1974); Opinion of Wisconsin Supreme Court, Ap. app. A at p. 18a. The only significant difference between the Wisconsin open primary and other means of apportioning delegates to the Democratic contenders for President is that the Wisconsin open primary law does not require persons to state their party preference publicly as a prerequisite to voting.

The principal reason advanced by the National Party for its opposition to open primaries is that the potential of crossover[5] voters might dilute the votes of Democratic Party adherents. The National Party has recognized that there is no evidence to show the existence of "raiding", i.e., Republican identifiers who vote in Democratic primaries for purposes of weakening the choice of the Democratic Party. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at p. 68, and, generally, Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis. L. Rev. 1269, 1301-1303. Thus, the National Party opposes open primaries because it is concerned with the *possibility* of a delegation being chosen "which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." Exhibit 4 at p. 68. While that position reflects interesting theory, the fact of the matter is that the statewide outcome in Wisconsin has not been affected to date by crossover voting. See Skornicka, *supra,* at p. 1302-1303, f/n 206.

Significantly, none of the procedures which are acceptable to the Democratic Party of the United States for apportioning delegates among various candidates produces participants which come close to fairly reflecting the statistical makeup of "Democratic identifiers in the electorate". Indeed, the Wisconsin open primary might be the procedure which most accurately reflects the beliefs of all Democratic identifiers in the general electorate. In any event, there is no factual basis for concluding that the Wisconsin open primary materially interferes with the associational goals of the Democratic Party of the United States.

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[5] Crossover in this context means independent voters who do not have any allegiance to either political party and Republicans who from time to time vote in Democratic primaries.

Exhibit 4 at pages 10 through 23 contains an extensive study of the various systems utilized for apportioning delegates. The Wisconsin open primary is also analyzed there. It is clear from these studies that closed primaries, caucuses, and conventions, as well as the Wisconsin open primary, utilize participants which vary significantly in all statistical classifications from persons who vote for the Democratic candidate at the general election. Generally speaking, all of these methods, regrettably, produce participants who are better educated, wealthier, whiter, and younger than the Democratic identifiers who vote in the November elections. The rank and file of the Democratic Party is significantly underrepresented in all systems utilized for apportioning delegates. "Wisconsin's Open Primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electorate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party." Opinion of Wisconsin Supreme Court, Ap. app. A, p. 26a. Thus, the Wisconsin open primary does not interfere with the goals of the National Party.

Indeed, in many statistical categories the Wisconsin open primary produces a more representative electorate when compared to the general election Democratic voters than any other system for apportioning delegates. For example, at page 14 of Exhibit 4, it is stated:

> "Limited evidence on 1976 suggests that while there may be a slight tendency for conservatives to be underrepresented in Democratic primary elections (due to the fact that the overrepresented, college educated tend to be more liberal), the two electorates may not be as distant as they were in 1972. For instance, the Wisconsin primary electorate had fewer people classifying themselves as conservatives but about the same number classifying themselves as liberals in the general electorate."

Thus, Wisconsin's Open Primary has been singled out as demonstrative of a primary electorate which comes close to the Democratic general electorate in November. Such a result is hardly adverse to the associational rights of the National Party. The Wisconsin Supreme Court realistically evaluated the facts and found no interference.

There is more than one way to dilute the preferences of democratic adherents. The National Party would have imposed a caucus system on Wisconsin had the Wisconsin Supreme Court failed to act. A caucus system represents a most serious dilution of the preferences of democratic adherents. Studies from other states demonstrate that there are very few voters who participate in caucuses. Less than 4% of the voters engage in such proceedings and those who do participate are completely unrepresentative of the rank and file of the Democratic Party. See Exhibit 4 at p. 15, and f/n 4, *supra,* p. 7, regarding the 1980 Michigan caucus system. Many democratic adherents are excluded from participation by the mere fact that the vast majority of democratic adherents do not participate in caucuses. Thus, the preferences of democratic adherents are diluted by nonparticipation. When the Wisconsin open primary is pitted against a caucus, the Wisconsin open primary poses no threat to the associational objectives of the National Party.

Another feature of the Wisconsin open primary which demonstrates that it does not interfere with the associational rights of the National Party is the fact that the delegates chosen in party caucuses by publicly declared Democrats are only required to vote for the candidates apportioned by the open primary on the first ballot and "on any additional ballot, unless released by said candidate, [or] until said candidate *fails to receive at least one-third of the votes authorized to be cast. . . .*" (Em-

phasis supplied). Section 8.12(c)(5), Wis. Stats.; Ap. app. A, pp. 58a-59a.

The National Party theorizes that the Wisconsin Open Primary could have an adverse impact upon the candidate selection process at its national convention. Just what that impact might be, however, apparently is hard to describe. If the Wisconsin open primary delegation helps a first ballot nomination, then, obviously, the Wisconsin open primary results are significantly in accord with other Democratic voter preferences from all over the country and cannot be deemed to have interfered with the National Party. Should the balloting proceed beyond the first ballot, then the Wisconsin delegates who were pledged to a candidate who did not receive at least one-third of the delegate votes from all national convention delegates in the first ballot are released under Wisconsin law to "vote according to [their] own judgment." *Id.* Those delegates would then become uncommitted under Wisconsin law and can vote any way they want to. This weening process is repeated on every succeeding ballot until a Presidential candidate is chosen. Since the delegates can only be persons who are chosen in full compliance with the rules of the National Party, it is difficult to conceive of any set of circumstances in which the open primary of Wisconsin would in any way interfere with the nomination process.

The Wisconsin Supreme Court recognized that there was no impact upon any of the associational rights of the National Party. Since that is the case, the National Party is presenting a theoretical problem to this Court. As noted recently in another setting, theoretical problems which are not in accord with reality do not merit interference with state law. Cf. *Mobil Oil Corp.* v. *Commissioner*

of Taxes of Vermont, ... U.S. ....., 48 U.S.L.W. 4306, 4311 (1980). In reality, there is no impact upon the associational rights of the National Party and, therefore, the decision of the Wisconsin Supreme Court declaring that the National Party cannot refuse to seat a Wisconsin delegation on the ground that that delegation was apportioned pursuant to the results of the Wisconsin open primary was completely in accord with decisions of this Court.

The decision of the Wisconsin Supreme Court should be summarily affirmed, should the Court conclude that it has appellate jurisdiction. Alternately, should the Court conclude that it does not have appellate jurisdiction, the Court should deny certiorari. See 28 U.S.C. § 2103.

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court either dismiss the appeal or affirm the judgment of the Wisconsin Supreme Court.

Dated this 12th day of May, 1980.

Respectfully submitted,

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